No.98-6730

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGE LANE and BEVERLY JONES,

Plaintiffs-Appellees

v.

STATE OF TENNESSEE

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

SUPPLEMENTAL BRIEF ON PANEL REHEARING FOR THE UNITED STATES AS INTERVENOR

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INTRODUCTION

On September 20, 2002, this Court granted the appellant State of Tennessee's motion for panel rehearing, withdrew its opinion of July 16, 2002, and ordered the parties to submit supplemental briefs addressing the issues raised in the State's petition for rehearing. In its July 16 opinion, the panel concluded that the plaintiffs in this case stated claims founded in due process violations and that, under this Court's en banc decision in *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc), cert. denied, 2002 WL 704377, No. 01-1503 (October 7, 2002), the state defendant was not immune from the plaintiffs' damages claims under Title II of the Americans with Disabilities

Act (ADA). In its petition for rehearing, the State argued that the plaintiffs' claims are not in fact founded in due process violations and that the State therefore enjoys Eleventh Amendment immunity from suit on those claims.

The United States intervened in this case pursuant to 28 U.S.C. 2403(a) in order to defend the constitutionality of the abrogation of Eleventh Amendment immunity from suit by private parties under the ADA. The United States is not taking a position on whether the particular facts alleged by these plaintiffs state valid claims of violations of either the Due Process Clause or the ADA.

ARGUMENT

Under This Court's Holding In *Popovich*, There Is A Due Process Basis For Applying Title II Of The ADA To Claims Of Denial Of Access To The Courts By Individuals With Disabilities

A. *The Court In* Popovich *Held That Title II Is An Appropriate Means Of Protecting The Due Process Clause Rights Of Persons With Disabilities*

In *Popovich* v. *Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc), this Court considered the validity of the abrogation of States' immunity to suit by private parties under Title II of the ADA. The Court examined the question in light of the Supreme Court's holding in *University of Alabama* v. *Garrett*, 531 U.S. 356 (2001). The *Garrett* Court reaffirmed that Section 5 of the Fourteenth Amendment grants Congress the power to abrogate States' Eleventh Amendment immunity to private damage suits. In assessing the validity of "§ 5 legislation reaching beyond the scope of § 1's actual guarantees,"

the legislation "must exhibit 'congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.'" *Garrett*, 531 U.S. at 365 (quoting *City of Boerne* v. *Flores*, 521 U.S. 507, 520 (1997)). This requires a three-step analysis: first, a court must "identify with some precision the scope of the constitutional right at issue," *id*. at 365; second, the court must "examine whether Congress identified a history and pattern of unconstitutional * * * discrimination by the States against the disabled," *id*. at 368; finally, the court must assess whether the "rights and remedies created" by the statute were "designed to guarantee meaningful enforcement" of the constitutional rights that Congress determined the States were violating, *id*. at 372, 373. Applying these "now familiar principles," *id*. at 365, the Court in *Garrett* held that Congress did not validly abrogate States' Eleventh Amendment immunity to suits by private individuals for money damages under Title I of the ADA.

In *Popovich*, this Court considered the question expressly reserved by the Supreme Court in *Garrett* – namely, whether the abrogation for Title II suits can be upheld as valid Section 5 legislation. Noting that the Supreme Court in *Garrett* recognized that Title II of the ADA differs from Title I in significant respects, the *Popovich* majority found that, whereas Title I covers "equal protection claims against states," Title II "encompasses various due process-type claims with varying standards of liability and is not limited to equal protection claims." 276 F.3d at 813. This Court based its holding on the *Garrett* Court's conclusion that the requirements of Title I could not be said to enforce the Equal Protection

Clause of the Fourteenth Amendment because Title I applies a standard that far exceeds the rational basis standard applicable to claims under the Equal Protection Clause. The *Popovich* Court concluded that the same analysis would bar damages suits against a State under Title II for claims based on equal protection principles. The Court found the *Popovich* plaintiff's claims to be distinguishable because they sounded in due process, and noted that, unlike "the flat rule giving only rational basis analysis under equal protection in disability matters," due process claims are assessed through a broader "balancing standard" that is "open to interpretation by Congress as well as the courts." *Id.* at 814.

The Court acknowledged the Supreme Court's admonition that Section 5 allows Congress to prohibit a "somewhat broader swath of conduct" than the courts have themselves identified as unconstitutional. *Garrett*, 531 U.S. at 365 (quoted in *Popovich*, 276 F.3d at 813). Based on these principles, the Court concluded that Title II validly abrogates Eleventh Amendment immunity for claims based on the guarantees of the Fourteenth Amendment's Due Process Clause even when those claims lie outside the set of claims that have been determined to state constitutional violations. *Popovich*, 276 F.3d at 814-815 ("[T]he courts should not tie the hands of Congress under Section 5 merely to the implementation of previous court decisions."). The Court concluded that the abrogation in Title II was valid in the context of protecting due process rights. Thus, Title II claims based on rights guaranteed by the Due Process Clause of Section 1 of the Fourteenth Amendment provide a valid basis for abrogating

States' immunity. See *ibid.* That conclusion should guide this Court in determining whether the ADA requirement that States operate their services and programs so that they are "readily accessible to and usable by individuals with disabilities," 28 C.F.R. 35.150(a), is based on the due process protections of the Fourteenth Amendment and is a congruent and proportional exercise of Congress's Section 5 authority.

B. *The Accessibility Requirements Of Title II Are Congruent And Proportional Means Under The Due Process Clause Of The Fourteenth Amendment To Protect Access To Courts For Individuals With Disabilities*

Among the rights protected by the Due Process Clause of the Fourteenth Amendment is the right of access to courts. For criminal defendants, like plaintiff Lane, the Due Process Clause has been interpreted to provide that "an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *Faretta* v. *California*, 422 U.S. 806, 819 n.15 (1975). The Sixth Amendment "grants to the accused personally the right to make his defense. It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'" *Id.* at 819. Parties in civil litigation have an analogous due process right to be present in the courtroom and to meaningfully participate unless their exclusion furthers important governmental interests. See, *e.g., Popovich*, 276 F.3d at 813-14; *Helminski* v. *Ayerst Labs.,* 766 F. 2d 208, 213 (6th Cir.), cert. denied, 474 U.S. 981 (1985). Moreover, the Constitution guarantees to criminal

defendants that court proceedings be open to the public, *Waller* v. *Georgia*, 467 U.S. 39, 47 (1984), and that defendants be tried by a jury of their peers, see U.S. Const. amend. VI. These guarantees are protective of the due process principles of equal justice and fair treatment in our courts. Finally, those who fail to appear in response to a court order cannot be sanctioned for that failure without being accorded due process. See, *e.g.*, *Groppi* v. *Leslie*, 404 U.S. 496, 502 (1972) ("Indeed, we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence.'" (citing *In re Oliver*, 333 U.S. 257, 273 (1948)).

The evidence before Congress when it enacted Title II established that physical barriers in government buildings, including courtrooms and courthouses, have had the effect of denying persons with disabilities an opportunity to obtain vital services and to exercise fundamental rights guaranteed by the Due Process Clause of the Fourteenth Amendment. The denial of access to courtrooms and other vital governmental services featured prominently in the testimony before Congress. For example, Congress heard testimony that "[t]he courthouse door is still closed to Americans with disabilities" – literally. 2 Staff of the House Comm. on Educ. and Labor, 101st Cong., 2d Sess., *Legis. Hist. of Pub. L. No. 101-336: The Americans with Disabilities Act*, 100th Cong., 2d Sess. 936 (Comm. Print 1990) (Sen. Harkin) (*Leg. Hist.*):

> I went to the courtroom one day and * * * I could not get into the building because there were about 500 steps to get in there. Then I called for the security guard to help me, who * * * told me there was an entrance at the

> back door for the handicapped people. * * * I went to the back door and there were three more stairs for me to get over to be able to ring a bell to announce my arrival so that somebody would come and open the door and maybe let me in. I was not able to do that. * * * This is the court system that is supposed to give me a fair hearing. It took me 2 hours to get in. * * * And when [the judge] finally saw me in the courtroom, he could not look at me because of my wheelchair. * * * The employees of the courtroom came back to me and told me, "You are not the norm. You are not the normal person we see every day."

Id. at 1071 (Emeka Nwojke). Numerous other witnesses explained that access to the courts[1] and other important government buildings and officials[2] depended

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[1] See, *e.g.*, Ala. 15 ("A man, called to testify in court, had to get out of his wheelchair and physically pull himself up three flights of stairs to reach the courtroom."); W. Va. 1745 (witness in court case had to be carried up two flights of stairs because the sheriff would not let him use the elevator). (A congressionally delegated Task Force on the Rights and Empowerment of Americans with Disabilities submitted to Congress "several thousand documents" evidencing "massive discrimination and segregation in all aspects of life" and "the most extreme isolation, unemployment, poverty, psychological abuse and physical deprivation experienced by any segment of our society." 2 *Leg. Hist.* 1324-1325. Those documents – mostly handwritten letters and commentaries collected during the Task Force's forums – were part of the official legislative history of the ADA. See *id*. at 1336, 1389. Both the majority and dissent in *Garrett* relied on these documents, see 531 U.S. at 369-370, with the dissent citing to them by State and Bates stamp number, *id*. at 389-424 (Breyer, J., dissenting), a practice we follow.)

[2] See, *e.g.*, H.R. Rep. No. 485, Pt. 2, 101st Cong., 2d Sess. 40 (1990) (town hall and public schools inaccessible); 2 *Leg. Hist.* 1331 (Justin Dart) ("We have clients whose children have been taken away from them and told to get parent information, but have no place to go because the services are not accessible. What chance do they ever have to get their children back?"); *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Comm. on Labor and Human Res. and the Subcomm. on the Handicapped*, 101st Cong., 1st Sess. 488, 491 (1989)(Ill. Att'y Gen. Hartigan) ("I have had innumerable complaints regarding lack of access to public services – people unable to meet with their elected representatives because their district office buildings were not accessible or unable to attend public meetings because they are held in an inaccessible building"; "individuals who are deaf or hearing impaired call[] our office for

(continued...)

upon their willingness to crawl or be carried.

The record before Congress included a report showing that 76% of state-owned buildings offering services and programs for the general public were inaccessible and unusable for persons with disabilities.[3] And Congress was told that state officials *themselves* had "pointed to negative attitudes and misconceptions as potent impediments to [their own] barrier removal policies." Advisory Comm'n on Intergovernmental Relations, *Disability Rights Mandates:*

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[2](...continued)
assistance because the arm of government they need to reach is not accessible to them"); *id*. at 76 ("[Y]ou cannot attend town council meetings on the second story of a building that does not have an elevator."); *id*. at 663 (Dr. Mary Lynn Fletcher) (to attend town meetings, "I (or anyone with a severe mobility impairment) must crawl up three flights of circular stairs to the 'Court Room.' In this room all public business is conducted by the county government whether on taxes, zoning, schools or any type of public business."); Ala. 17 (every day at her job, the Director of Alabama's Disabled Persons Protection Commission "ha[d] to drive home to use the bathroom or call [her] husband to drive in and help [her] because the newly renovated State House" lacked accessible bathrooms); Alaska 73 ("We have major problems in Seward, regarding accessibility to City and State buildings for the handicapped." City Manager responded that "[H]e runs this town * * * and no one is going to tell him what to do."); Ind. 626 ("Raney, who has been in a wheelchair for 12 years, tried three times last year to testify before state legislative committees. And three times, he was thwarted by a narrow set of Statehouse stairs, the only route to the small hearing room."); Ind. 651 (person with disabilities could not attend government meetings or court proceedings because entrances and locations were inaccessible); Wis. 1758 (lack of access to City Hall); Wyo. 1786 (individual unable to get a marriage license because the county courthouse was not wheelchair accessible); Calif. Att'y Gen., *Commission on Disability: Final Report* 70 (Dec. 1989) ("People with disabilities are often unable to gain access to public meetings of governmental and quasi-governmental agencies to exercise their legal right to comment on issues that impact their lives.").

[3] Civil Rights Comm'n, *Accommodating the Spectrum of Individual Abilities* 39 (1983) (*Spectrum*)).

Federal and State Compliance with Employment Protections and Architectural Barrier Removal 87 (Apr. 1989).

In *Popovich*, 276 F.3d at 815-816, this Court found that Title II was enacted "to guarantee *meaningful* enforcement," *Garrett*, 531 U.S. at 373 (emphasis added), of the constitutional rights of persons with disabilities. The Court recognized that

Congress has a role to play in preventing and remedying violations of those rights and, to that end, Congress may seek to deter a "somewhat broader swath of conduct" than the courts have themselves identified as unconstitutional. *Garrett*, 531 U.S. at 365 (quoted in *Popovich*, 276 F.3d at 814 (comparing the requirements of the Due Process Clause to the requirements of Title II)).

This Court also concluded that, "[i]n legislating on the subject of disability, Congress may require states * * * to consider" several factors, including the nature of the constitutional right, the fact that costs of compliance may be small, and the effects of failure to accommodate the needs of those with disabilities. *Popovich*, 276 F.3d at 815. Applying that principle, in the context of this case, Congress could ask states to weigh (1) the fundamental importance that access to the courts has in our system of justice; (2) that, without reasonable steps to remove physical barriers, persons with physical disabilities will be forced either to forego the right to be present in court or to secure it at the expense of their human dignity by crawling or being carried into court; (3) that, although not every instance of blocked access to court amounts to a constitutional violation, the existence of

physical barriers to courts risks unduly burdening the exercise of constitutional rights; (4) and that often there will be a simple, inexpensive means of eliminating the barriers.[4] See *id.* at 814-816 (discussing the broad balancing of factors required by the Due Process Clause).

Based on the record Congress considered, it was reasonable for Congress to conclude that it needed to enact legislation to prevent States from unduly burdening constitutional rights, including the right of access to courts. The requirement that States operate their services and programs so that they are "readily accessible to and usable by individuals with disabilities," 28 C.F.R. 35.150(a),[5] when applied to courts, serves to avoid undue burdens on those rights. States have available to them several avenues through which they can achieve the required accessibility, including delivering services at alternate accessible sites when the need arises, assigning aides to assist beneficiaries, redesigning equipment, altering existing facilities or constructing new facilities, "or any other methods that result in making its services, programs or activities readily accessible

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[4] Congress determined, based on the consistent testimony of witnesses and expert studies, that, contrary to the misconceptions of many, the vast majority of accommodations entail little or no cost, especially when measured against the financial and human costs of excluding persons with disabilities from needed government services or the equal exercise of fundamental rights, thereby rendering them a permanent underclass. See *Plyler* v. *Doe*, 457 U.S. 202, 223-224, 227 (1982).

[5] Title II of the ADA also requires that, when public entities construct new facilities or alter existing facilities, they do so in such a manner that those facilities are "readily accessible to and usable by individuals with disabilities." 28 C.F.R. 35.151.

to and usable by individuals with disabilities." 28 C.F.R. 35.150(b)(1).[6] The record demonstrated that public entities' failure to accommodate the needs of qualified persons with disabilities may result directly from unconstitutional animus and impermissible stereotypes. Title II simply makes certain that the refusal to accommodate an individual with a disability is genuinely based on unreasonable cost or actual inability to accommodate, rather than on nothing but the discomfort with the disability or unfounded concern about the costs of accommodation.

That margin of statutory protection does not redefine the constitutional right at issue. Instead, the statutory protection acts prophylactically to enforce the courts' constitutional standard before individuals with disabilities are forced to decide whether to forego being present in court. Such a prophylactic response is commensurate with the problem of States ignoring the needs of those with disabilities. It makes particular sense in the context of access to courts, where a *post hoc* judicial remedy may be of limited utility.

In addition, these requirements are carefully tailored to the unique features of disability discrimination that Congress found persisted in public services. In light of the segregation and isolation and the resulting entrenched stereotypes,

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[6] The statute requires modifications only where "reasonable." 42 U.S.C. 12131(2). Governments need not make modifications that require "fundamental alteration[s] in the nature of a service, program, or activity," in light of their nature or cost, agency resources, and the operational practices and structure of the position. 28 C.F.R. 35.150(a)(3), 35.130(b)(7), 35.164; *Olmstead* v. *L.C.*, 527 U.S. 581, 606 n.16 (1999).

fear, prejudices, and ignorance about persons with disabilities, Congress could reasonably have determined that a simple ban on discrimination would be insufficient to erase the continuing legacy of discrimination. Therefore, Title II affirmatively promotes the integration of individuals with disabilities – in order both to remedy past unconstitutional conduct and to prevent future such conduct. Certainly, providing for the presence of persons with disabilities in courtrooms participating in the judicial process is an important means of accomplishing that goal.

C. *This Court Should Affirm The District Court's Denial Of The State's Motion To Dismiss And Remand This Case For Factual Development And Analysis Of The Plaintiffs' Claims*

The plaintiffs in this case are seeking to vindicate what they claim is their right of access to courtrooms in Tennessee. Since the *Popovich* Court held that Title II is an appropriate means of enforcing the due process rights of individuals with disabilities, this Court should affirm the district court's denial of the State's motion to dismiss and remand for further proceedings.

The plaintiffs' claims come to this Court prior to any factual development of their respective cases. Whereas in *Popovich*, this Court had the benefit of a full trial, in this appeal, the Court has only the allegations in the plaintiffs' complaint, allegations made prior to the Court announcing the *Popovich* standard. In the complaint, plaintiff Lane alleges that the defendants "have excluded him from participation in, or denied him the benefits of, the services of its court systems in

violation of" Title II (Apx. 20).[7] Plaintiff Jones similarly alleges that the defendants "have discriminated against" her and have "excluded her from participating in the services offered by courthouses and access to the Court proceedings of this State by failing to eliminate physical obstacles to her participation in the judicial processes of this State in violation of" Title II (Apx. 20). The plaintiffs further allege that the actions of the defendants were "conscious, deliberate, and intentional in their active discrimination against the plaintiffs" and that both plaintiffs suffered injuries as a result of the defendants' willful failure to comply with Title II (Apx. 21). The plaintiffs have requested money damages and injunctive relief (Apx. 22-23).

Although the state defendant asserts that the plaintiffs' claims for relief are not founded on violations of rights protected by the Due Process Clause, it is difficult to assess the validity of that assertion absent a factual record. The State's petition raises serious questions about whether the plaintiffs in this case have protectable rights, whether they are in a position to assert the rights of other people, and what remedies are available if they do in fact state claims upon which they should prevail. All of these questions should be examined by a factfinder in the first instance. Thus, the United States urges this Court to affirm the district court's denial of the defendants' motion to dismiss and to remand this case for further proceedings consistent with *Popovich*.

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[7] References to "Apx. __" are to pages in the Joint Appendix filed by the plaintiffs in this appeal.

CONCLUSION

This Court should affirm the district court's order and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2002, a copy of the foregoing Supplemental Brief on Panel Rehearing for the United States as Intervenor was served by overnight mail, postage pre-paid, on the following counsel of record:

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